## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD THIRTIETH REGION

UNITED KISER SERVICES, LLC

and

CONSTRUCTION & GENERAL LABORERS' UNION, LOCAL 1329

Case No. 30-CA-18129 30-CB-5352

and,

NORTHERN WISCONSIN REGIONAL COUNCIL OF CARPENTERS

CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Charging party Northern Wisconsin Regional Council of Carpenters

("Carpenters"), by its attorneys, excepts to the following portions of the decision of

Administrative Law Judge Bruce D. Rosenstein:

- 1. Page 2, n. 2: The ALJ erred by failing to reverse his prior decision to reject GC exhibits 20-31, since bargaining history evidence is directly relevant to the bargaining relationship between United Kiser and the Carpenters, when the bargaining history concerns the legal predecessor of United Kiser.
- 2. Page. 2, lines 29-30: The ALJ erred by concluding that United Kiser is engaged in the business of repairing hydroelectric equipment, since undisputed evidence in the record shows that United Kiser's business is not so limited.
- 3. Page 2, lines 41-42. The ALJ erred by stating that the Employer's recognition of the charging party is limited to the so called "Millwright Craft Employees." In fact, the recognition extended to all of United Kiser's field Carpenters, as well as all

employees performing work listed in page 2 of the shop agreement between United Kiser and the Carpenters.

- 4. Page 2, lines 45-47: The ALJ erred when he found that the laborers bargaining unit was an appropriate bargaining unit.
- 5. Page 3, lines 3-5: The ALJ erred when he failed to find that the shop agreement between United Kiser and the laborers was unlawful, because it covered work that was already covered by the Carpenters' shop agreement.
- 6. Page 3, lines 18-19: The ALJ erred by concluding that Manowski served as the Charging Party Shop Steward at all material times; or specifically after January 1, 2006.
- 7. Page 3, lines 46-49: The ALJ erred by concluding that the geographical jurisdiction of the field agreement covering United Kiser and the Carpenters did not include Dickenson County, Michigan. Parole evidence is admissible to illustrate the intent of United Kiser and the Carpenters as to the jurisdictional reach of the field agreement; and such evidence shows the parties agreed to extend the field agreement to cover Dickenson County, Michigan.
- 8. Page 4, lines 2-3: The ALJ erred by concluding that Manowski continued to hold the position of union steward after he was rehired by United Kiser.
- 9. Page 4, lines 6-8: The ALJ erred in his findings with respect to the reasons why Manowksi has never filed or handled a grievance, or taken any actions on behalf of the employees. There is no evidence that the reason was a harmonious working relationship. Rather, the reasons were that Manowski did not have authority to make any independent decisions on behalf of the Carpenters (Tr. 179), was told to

contact Carpenters business agent Greg Dhein if there were any problems with the unit (Tr. 95), and that no employee had ever approached Manowski with a workplace related problem. (Tr. 93) The fact no employees ever approached Manowski with a workplace related problem can be explained by the fact that he was not regarded as the steward by his co-workers.

- 10. Page 4, lines 8-10: The ALJ erred by finding that Manowski has filled out documents for the Carpenters. Manowski has not filled out any documents for the Carpenters as an employee of United Kiser, or indeed for the past five years. (Tr. 81) Whether Manowski filled out documents more than five years ago for the Carpenters, when he was employed by Kiser Johnson, is not relevant to Manowski's possible status as an agent of the Carpenters at United Kiser.
- 11. Page 4, lines 12-13: The ALJ erred by concluding that Manowski first observed laborers in the shop performing marine equipment work between January and June of 2007. In fact, Manowski testified that he first saw laborers work in the shop in May or June of 2007 (Tr. 83).
- 12. Page 4, lines 13-14: The ALJ mischaracterized Manowski's testimony, since Manowski never testified about how many laborers he saw were hired between January and June of 2007.
- 13. Page 4, lines 14-15: The ALJ erred by stating that the laborers worked in the next bay from Manowski's assigned location since there is no evidence in the record concerning what Manowski's assigned location was or where the laborers worked in relation to Manowski's "assigned location".
  - 14. Page 4, lines 16-17: The ALJ erred by giving legal significance to

Manowski's discussions of the benefits of the laborers' union's shop agreement with the laborers employees. First, Manowski did not know whether the benefits discussed were based on the laborers' shop agreement or the field agreement. (Tr. 120). Second, any discussion between Manowski and the laborers is legally irrelevant since it occurred in approximately June of 2008 (Tr. 101), or inside the §10(b) period.

- 15. Page 4, lines 27-28: The ALJ erred by concluding that Dhein's service at United Kiser was limited to the 4-6 shop millwrights. Dhein is also the primary business representative for the group of 15-20 field carpenters. (Tr. 128)
- 16. Page 4, lines 41-43: The ALJ erred by giving legal significance to Dhein's testimony that Manowski did not have qualified or reduced steward duties, since the record does not establish what Dhein's expectations are as to the normal duties of stewards, or that a steward performing normal steward duties as Dhein expects can have his knowledge charged to the union.
- 17. Page 5, lines 24-25: The ALJ erred by giving legal significance to Dhein's lack of a specific recollection of stopping at the shop and talking to the shop employees in 2007, given his practice of doing so each time he is at the United Kiser facility.
- 18. Page 5, lines 29-31: The ALJ erred by concluding that Dhein did not go down to the shop to visit with the Carpenters employees during his July 2007 shop visit.
- 19. Page 5, lines 45-47: The ALJ erred when he concluded that Dhein learned during the June, 2008 bargaining session that laborers employees had ever, or were presently working in the marine line of business. Dhein learned that laborers had worked in the shop, but did not learn what line of business they were working in.
  - 20. Page 5, lines 44-50: The ALJ erred when he concluded that Dhein

learned in June of 2008 that the laborers employees performing the marine work had been hired in early 2007; that the marine work was ongoing, that the Michigan Laborers was representing the laborers employees in a separate bargaining unit, or that a separate contract had been executed covering the shop laborers. (Tr. 198-199)

- 21. Page 6, lines 21-23: The ALJ erred in his citation to the holding of *Moeller Brothers*, which actually held that a union can be charged with constructive notice only when it failed to exercise diligence and would have uncovered the unfair labor practices raised in the complaint through mere observation.
- 22. Page 6, lines 24-27, 48-51: The ALJ erred by holding that Board precedents permit imputing the knowledge of unit employees to their bargaining representatives. The relevant authority cited by the ALJ only stands for the proposition that the knowledge of union stewards with substantial contract negotiation or administration responsibilities may be charged to the Union.
- 23. Page 6, line 35-38: The ALJ erred when he concluded that the Carpenters had actual or constructive knowledge of the Shop Agreement between United Kiser and the Laborers before June of 2008; or had actual or constructive knowledge that members of the Michigan laborers were performing marine equipment work (or for that matter any work) in the shop. The ALJ further erred by finding that the relevant legal question before him, for the purpose of §10(b) of the Act, was whether the Carpenters had actual or constructive notice of laborers performing marine equipment work in the shop: Notice that United Kiser was using its field laborers to work in the shop would give the Carpenters notice that United Kiser was violating its agreements with the Carpenters, but would not give the Carpenters notice of the factual basis

required to sustain its charge of unfair labor practices against either United Kaiser or the Laborers.

- 24. Page 6, lines 44-45: The ALJ erred by concluding United Kiser first acquired the marine equipment work in late 2006, since the record is silent on when United Kiser acquired the work.
- 25. Page 6, lines 50-51: The ALJ erred by applying *A& M Wallboard*, 318 NLRB 196 (1995) to the case at bar.
- 26. Page 7, lines 14-15: The ALJ erred by imposing the burden of proof upon the General Counsel to show that Dhein exercised reasonable diligence in servicing the United Kiser shop. The burden of proof to show the lack of diligence should be imposed upon United Kiser and the Michigan Laborers. The ALJ additionall erred by charging constructive notice to Dhein.
- 27. Page 7, line 25: The ALJ erred by finding that Dhein testified that he did not visit the shop on July 23, 2007; when Dhein actually testified that he did not recall visiting the shop on that day.
- 28. Page 7, line 26: The ALJ erred by inferring that Dhein did not visit the shop in 2007, when in fact he testified that he did not recall visiting the shop in 2007; but that his practice was to visit the shop each time that he visited United Kiser. Dhein's practice supports an inference that he did visit the shop twice in 2007; and that he spoke with Carpenters employees each time.
- 29. Page 7, line 28: The ALJ erred by concluding that Dhein did not exercise reasonable diligence. Dhein had no special obligation to visit the United Kiser shop, on pain of being charged with §10(b) constructive notice, when he had no reason to

suspect that United Kiser or the Laborers were violating the Act.

- 30. Page 7, lines 28-30: The ALJ erred by considering as relevant a comparison of the number of shop visits of Dhein and Laborers Business Representative Gallino. The sole question before the ALJ was whether Dhein was adequately diligent, regardless of how he compared with Gallino.
- 31. Page 7, lines 33-35: The ALJ erred, when he failed to find that Dhein visited with the shop employees during his January, 2008 shop visit.
- 32. Page 7, lines 35-37: The ALJ erred by ruling that due diligence by Dhein to avoid being charged with constructive notice of an unfair labor practice would require both talking to Manowski regularly, and going into the shop work area more than twice per year, when the Carpenters had no reason to suspect that United Kiser had laborers working in the shop. The ALJ additionally erred by ruling that Dhein could be charged with constructive notice of the unfair labor practices alleged in the complaints, even assuming he could have learned that laborers were working in the shop.
- 33. Page 7, lines 40-43: The ALJ erred in his findings concerning when Manowski acquired knowledge of laborers' activities in the shop: Manowski did not know until May or June of 2007 that laborers were working in the shop. There is no evidence in the record concerning when Manowski first knew that the laborers were working under a labor agreement, or that the labor agreement was between United Kiser and the Michigan Laborers.
- 34. Page 7, line 44 to page 8, line 2: Manowski never testified that he was the point of contact for employees to discuss their terms and conditions of employment with United Kiser. Manowski instead testified that he was told that if any employees

came to him with a problem, he should refer the problem to Carpenters' Business Agent Dhein. (Tr. 95)

- 35. Page 8, lines 7-8: The ALJ erred by charging information within Manowski's knowledge to the Carpenters.
- 36. Page 8, lines 10-16: The ALJ erred when he concluded that Dhein failed to exercise reasonable diligence, and that through the exercise of reasonable diligence Dhein would have learned that Laborers were performing work covered by the Carpenters' shop agreement at the United Kiser shop.
- 37. Page 8, lines 18-20: The ALJ erred by charging the Carpenters with either actual or constructive knowledge that United Kiser had laborers working in the shop
- 38. Page 8, lines 18-21: The ALJ erred by concluding that because (he found) the Carpenters had knowledge that United Kiser had laborers working in the shop that the Carpenters also had knowledge of all of the facts needed to make its unfair labor practice charges ripe against either United Kiser or the Laborers; so that the charges are barred by §10(b) of the Act.
- 39. Page 8, lines 24-25: The ALJ erred by dismissing all of the charges filed by the Carpenters against United Kiser and the Michigan Laborers, aside from the charge concerning delayed bargaining.
- 40. Page 8, lines 37-43: The ALJ erred by applying *Bryan Manufacturing* to the case at bar, since all of the facts underlying the Carpentes' unfair labor practice charges were raised in timely filed unfair labor practice charges. Alternatively, the ALJ erred by applying *Bryan Manufacturing* to bar allegations concerning the unlawful

recognition of the Laborers to perform hydroelectric work; and the Laborers acceptance of said recognition.

- 41. Page 8, line 44: The ALJ erred by concluding that the charge in the CB case was filed on October 27, 2008; when the charge was in fact filed on October 24, 2008, and received by the Laborers on October 27, 2008.
- 42. Page 8, lines 45-47: The ALJ erred when he found that it would not be necessary to address on the merits whether United Kiser violated the Act by recognizing the Michigan Laborers to represent a unit of shop laborers, whether Michigan Laborers violated the Act by accepting United Kiser's illegal recognition, as well as whether both United Kiser and Michigan Laborers violated the Act by entering into a separate agreement covering the illegally recognized shop laborers since all of the charges are not barred by §10(b) of the Act.
- 43. Page 10, lines 3-4: The ALJ erred by mischaracterizing the issue before him as whether United Kiser unlawfully refused, as opposed to delayed bargaining, and by failing to find that United Kiser's delayed bargaining violated the Act.
- 44. Page 10, lines 9-14: The ALJ erred by holding that an employer can delay bargaining for more than two months for the purpose of conducting a legal review of its obligation to bargain without violating the Act.
- 45. Page 10, lines 16-18: The ALJ erred by concluding that United Kiser did not have an obligation to bargain over a successor shop agreement, when United Kiser had waived its right to object to the untimeliness of the reopener notice.
- 46. Page 10, lines 18-21: The ALJ erred by relying upon a mis-statement by counsel to find that the shop agreement had renewed, especially since there is a similar

mis-statement in the record by counsel for United Kiser stating that the shop agreement had not renewed. Under Board law mis-statements by counsel are not binding upon their clients.

- 47. Page 10, lines 22-24: The ALJ erred by finding that United Kiser never had an obligation to negotiate over a successor shop agreement and therefore did not unlawfully delay bargaining.
- 48. Page 10, lines 24-27: The ALJ erred by finding that the shop agreement renewed on June 1, 2008, that United Kiser's subjective intent in meeting with the Carpenters was to explore possible revisions to the existing agreement as opposed to carrying out what it believed to be its duty under the Act to bargain, and that United Kiser did not waive its right to object to the untimeliness of the Carpenters' reopener notice.
- 49. Page 11, lines 1-3: The ALJ erred by concluding that United Kiser did not unlawfully delay bargaining with the Carpenters.
- 50. Page 11, lines 4-5: The ALJ erred by recommending the dismissal of paragraph 10 of the complaint; and by finding that United Kiser did not violate §8(a)(1) and (5) of the Act through its unlawful delay bargaining.
- 51. Page 11, lines 18-20: The ALJ erred by dismissing the remainder of the complaint against United Kiser on the grounds that the unfair labor practice charges were untimely filed; and that United Kiser did not unlawfully delay bargaining.
- 52. Page 11, lines 22-23: The ALJ erred by dismissing the entirety of the complaint against the Michigan Laborers on the ground that the unfair labor practice charges were untimely filed.

## Dated this 25th day of September, 2009

Respectfully submitted,

s/Yingtao Ho
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